Supreme Court, U.S.
FILED
NOV 9 - 2009
OFFICE OF THE CLERK

No. 09-429

In The Supreme Court of the United States

SARAH ELLENBERG,

Petitioner,

v.

NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school student who is eligible for an Individualized Educational Plan (IEP), due to a behavioral disorder, is automatically considered "handicapped" under Section 504 of the Rehabilitation Act or "disabled" under Title II of the Americans with Disabilities Act (ADA), thus eliminating the need to prove that she is disabled/handicapped under the statutory definitions contained in the ADA and Rehabilitation Act.

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STATEMENT OF THE CASE

Glaringly absent from Petitioner Sarah Ellenberg's "Statement of the Case" are those facts which make this case decidedly a poor candidate for this Court's review. Thus, Respondent New Mexico Military Institute (NMMI) provides the following Statement of the Case pursuant to Supreme Court Rule 15.2.

NMMI is a state educational institution that offers a college preparatory education in a military-style setting. NMMI's admission standards require that applicants, among other things, have no major disciplinary, drug, or alcohol problems. Sarah Ellenberg had a history of behavior inconsistent with this requirement.

In 2000, shortly after she moved to New Mexico, Ellenberg stole her parents' car and credit card, and her parents pressed charges against her. Because of this incident, and to address her substance abuse problems, Ellenberg was placed in a residential treatment program in Taos, New Mexico. In November of 2002, the Taos Municipal School District evaluated Ellenberg and concluded she was qualified for special education services on the basis that she was diagnosed with Oppositional Defiance Disorder. Accordingly, the school district developed an IEP for Ellenberg.

While in the residential treatment facility, Ellenberg applied to NMMI for admission for the Fall 2003 semester. NMMI notified Ellenberg and her parents

that she would not be admitted for the upcoming fall semester. The reasons given for NMMI's decision included: 1) Ellenberg's admitted past drug use, 2) her presence in a residential treatment program, 3) her present medication requirements, and 4) her need for continued counseling. NMMI advised Ellenberg and her family, however, that she would be considered for admission the following spring semester if she demonstrated the ability to succeed "in an educational environment other than a Residential Treatment Facility." Ellenberg did not reapply.

Rather than re-apply after Ellenberg completed her treatment, Ellenberg's parents pursued an IDEA administrative claim, culminating in a due process hearing. After failing to persuade the due process hearing officer of the merits of her claim, Ellenberg's parents filed suit in federal court, asserting claims under (1) the IDEA, (2) Section 504 of the Rehabilitation Act, and (3) Title II of the ADA. The district court rejected Ellenberg's IDEA claim, finding NMMI had satisfied its IDEA obligations. The district court further found that because NMMI complied with the IDEA, Ellenberg's ADA and Section 504 claims failed as a matter of law.

On appeal, the Tenth Circuit affirmed the dismissal of the IDEA claim, but reversed the dismissal of Ellenberg's claims under the ADA and Rehabilitation Act. The case was remanded for reconsideration of Ellenberg's ADA and Rehabilitation Act claims. *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007).

After remand, Ellenberg amended her federal court complaint, but failed to come forward with evidence that she is an otherwise qualified disabled or handicapped person as contemplated by the ADA or § 504, preferring to stand on her previous determination of eligibility for services under the IDEA. NMMI filed a motion for summary judgment on Ellenberg's Section 504 and ADA claims, pointing out Ellenberg's inability to make a prima facie showing of "disability" pursuant to the ADA or "handicap" under the Rehabilitation Act. The district court agreed and granted summary judgment in favor of NMMI. The Tenth Circuit affirmed the district court, and rejected Ellenberg's argument that her entitlement to an IEP under the IDEA automatically rendered her "disabled" under the ADA or "handicapped" under Section 504. *Ellenberg v. New Mexico Military Institute*, 572 F.3d 815 (10th Cir. 2009).

ARGUMENT

A. Ellenberg's "Question Presented" Is Overly Broad

Ellenberg asserts that the following question is before this Court:

> Whether a school-aged person with current status as a "child with a disability" eligible for special education under the Individuals with Disabilities Education Act is, on the basis of such status, protected from disability discrimination by public schools under

> Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act.

Ellenberg's "question presented" is overly broad because even if the Court accepted Ellenberg's position that she is automatically considered "disabled" under the ADA or "handicapped" under Section 504, she would not necessarily be entitled to protection under those statutes. In addition to showing she has a disability and/or is handicapped, Ellenberg must also show that she is qualified, with or without reasonable accommodations and that she was discriminated against because of her disability. *See Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003); *Jarvis v. Potter,* 500 F.3d 1113, 1121 (10th Cir. 2007). Only then would Ellenberg be entitled to "protection" under the ADA or the Rehabilitation Act. As noted below, the record lacks even an allegation that Ellenberg was qualified, with or without accommodation, or evidence indicating what type of reasonable accommodations NMMI could provide to make Ellenberg's attendance at NMMI possible.

B. Accepting This Case For Review Would Be A Waste Of Judicial Resources

The Tenth Circuit, in a well-reasoned decision, correctly ruled that Ellenberg's receipt of special education services at her high school does not automatically render her "disabled" under the ADA or "handicapped" pursuant to the Rehabilitation Act. No

sound legal reason exists for reversing the Tenth Circuit's decision. Accordingly, it would not be economical for the Court to review the Tenth Circuit's decision.

1. Ellenberg Cannot Rely On Her Diagnosed Condition As A Basis For Claiming She Is Handicapped Under The Rehabilitation Act

First, the mere fact that Ellenberg was diagnosed with a psychological condition (Oppositional Defiance Disorder) does not automatically qualify her as "disabled" under the ADA or "handicapped" under the Rehabilitation Act, and relieve her of the burden of proving that her condition is "a 'disability' for [her specifically] as defined by the Act." *Williams v. City of Charlotte, N.C.*, 899 F. Supp. 1484, 1488 (W.D.N.C. 1995); *see also Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (citations and quotations omitted). In other words, not every person who has a diagnosis from a physician is, per se, "disabled" or "handicapped." A plaintiff who brings a claim under the ADA or the Rehabilitation Act must present evidence of a disability – which Ellenberg did not do.

2. Ellenberg Offers A Faulty Regulation Interpretation To Support Her Claim That She Is "Handicapped" Under The Rehabilitation Act

In addition, Ellenberg's argument that, as the recipient of an IEP from the Taos Municipal School District, she was relieved of the burden of proving that she was "disabled" or "handicapped" in her lawsuit against NMMI, was rejected by the district court, the Tenth Circuit, and would certainly be rejected by this Court. Ellenberg's argument ignores sound principles of statutory construction and fails to credit years of precedent that teach the proper way to analyze a claim brought pursuant to the Rehabilitation Act.

To qualify for relief under the Rehabilitation Act, a plaintiff must demonstrate that (1) she is a handicapped person within the meaning of the Act; (2) she is otherwise qualified; (3) the program receives federal financial assistance; and (4) she was discriminated against because of the handicap. *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 114 (2008). Definitions contained in the regulations that implement the Act determine whether an individual is eligible for relief. Those regulations require a two-part analysis of whether an individual is "handicapped." First, the individual must be a "handicapped" person, which is defined as a person who has a physical or mental impairment that "substantially limits one or more major life activities" (or has a record of such impairment, or

is "regarded as" having such an impairment). 34 C.F.R. § 104.3(j)(1). Second, the individual must be a "*qualified* handicapped person." A *qualified* handicapped person is defined as a *handicapped* person who meets certain other qualifications, one of which is that the individual is entitled to a free appropriate public education under the IDEA. 34 C.F.R. § 104.3(l)(2). Read as a whole, then, the regulations provide that an individual is not covered by the Act unless she is:

1) a "handicapped" person (substantial limitation of a major life activity); and

2) a "qualified" handicapped person (such as a person who is IDEA eligible).

Ellenberg argued to the Tenth Circuit that because she was IDEA eligible (she received special education services), she was automatically a handicapped person under the Rehabilitation Act. The court rejected her argument because she skipped the first step in applying the regulations: She failed to offer evidence that she was handicapped by virtue of a substantial limitation of a major life activity.[1]

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[1] The analysis under the ADA is even more straightforward because the ADA does not have a reference to the IDEA similar to that contained in the implementing regulations of the Rehabilitation Act at 34 C.F.R. § 104.3(l)(2). Similar to requirements under the Rehabilitation Act, to satisfy the ADA's definition of disability, a plaintiff must " '(1) have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one

(Continued on following page)

3. Ellenberg Proposes An Unworkable Approach To Determining Whether Individuals Are "Handicapped" Under The Rehabilitation Act

Furthermore, Ellenberg's argument that every individual who is IDEA eligible is automatically handicapped under the Rehabilitation Act is unworkable, because the statutory definitions of "child with a disability" under the IDEA and "handicapped person" under the Rehabilitation Act are notably different. The definition of a child with a disability under IDEA, at 20 U.S.C. § 1401(3)(A), is a child:

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

Notably absent from this definition is a requirement that the child's impairment "substantially limit a major life activity." The definition of "handicapped

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or more of those activities.'" *Berry v. T-Mobile*, 490 F.3d 1211, 1216 (10th Cir. 2007) (quoting *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 765 (10th Cir. 2006)). As noted by the Tenth Circuit, Ellenberg's failure to put forward a specific argument of how her disability substantially limits a major life activity precludes her claim under the ADA. *See Ellenberg*, 572 F.3d at 824.

person" under the Rehabilitation Act, on the other hand, requires proof that the impairment substantially limits a major life activity. 34 C.F.R. § 104.3(j).

Ellenberg's proposition that all students who receive special education services pursuant to the IDEA are automatically "handicapped" pursuant to the Rehabilitation Act is unworkable because the two statutes have distinct purposes. As noted by the court in *Bowers v. National Collegiate Athletic Ass'n,* 563 F. Supp. 2d 508, 533 (D.N.J. 2008), "[a]lthough both the Rehabilitation Act and the IDEA provide certain forms of relief for children with disabilities, the statutes have distinct purposes: while the Rehabilitation Act provides relief from discrimination, the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination." In distinguishing the definition of "handicapped person" under the Rehabilitation Act and a "child with a disability" under the IDEA, the *Bowers* Court stated as follows:

> As these separate statutory treatments of the terms 'disability' and 'handicapped' make clear, a special education student is not necessarily a qualified individual with a disability under the Rehabilitation Act. . . . [T]he likelihood of overlap [between the IDEA and Rehabilitation Act] does not, as Plaintiff argues, mean that a student receiving special education services under the IDEA is per se handicapped under the Rehabilitation Act, and does not relieve Plaintiff of her burden of proving by a

> preponderance of the evidence that Bowers had a physical or mental impairment which substantially limit[ed] one or more major life activities.

Id. (some internal citation and quotations omitted).

Many students who qualify for special education services may also be substantially limited in a major life activity. That does not mean, however, that all students who qualify for such services are substantially limited in a major life activity. For that reason, it is unworkable to conflate the definitions of "qualified handicapped" persons under the Rehabilitation Act and "child with a disability" under the IDEA. Additionally, as noted in *Bowers,* the legislative history of the Rehabilitation Act "'does not indicate that a violation of the IDEA is a per se violation of the Rehabilitation Act . . . a plaintiff must still prove that there was a violation of the Rehabilitation Act.'" *Id.* (quoting *Andrew M. v. Delaware County Office,* 490 F.3d 337, 349 (3rd Cir. 2007)). Ellenberg failed to identify any evidence that her emotional disturbance substantially limited any of her major life activities. Instead, she relied upon a flawed argument that her receipt of special education services in high school automatically rendered her "disabled" or "handicapped" for purposes of suing NMMI under the ADA and the Rehabilitation Act. The district court and the Tenth Circuit Court of Appeals correctly rejected her argument, and this Court should not expend its resources in reviewing this case.

C. The Tenth Circuit Could Have Affirmed For Any Number Of Reasons

Although the Tenth Circuit affirmed the district court's decision based on NMMI's argument that Ellenberg failed to prove that she was "handicapped" under the Rehabilitation Act or "disabled" under the ADA, the court could have affirmed for any number of reasons.

First, the record contained neither an allegation nor evidence that Ellenberg was otherwise qualified to attend NMMI. This Court has clarified that an "otherwise qualified person" under the Rehabilitation Act is one who is able to meet all of a program's requirements in spite of her handicap. *Southeastern Comm. Coll. v. Davis*, 442 U.S. 397, 398 (1979). Title II of the ADA defines a "qualified individual with a disability" similarly, as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids or services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The record below shows that the due process hearing officer found that Ellenberg's parents did not meet their burden of proving that Ellenberg met the standards for admission. Ellenberg failed to allege any additional facts to the district court to demonstrate otherwise.

The record also shows that NMMI met its burden of demonstrating, at the summary judgment stage, that Ellenberg was not qualified for admission to NMMI because she did not meet the essential eligibility requirements to attend NMMI. Her personal history, disclosed to NMMI's admissions office through letters from Ellenberg herself, her therapist, doctor, and her parents, alone fit within several of the disqualifying behavioral standards listed in NMMI's catalog. This included her history of conflicts with her family, her arrest, felony charge and sentencing to a residential treatment center, her drug use, and her probationary status in the legal system. These are facts Ellenberg continues to ignore.

Second, Ellenberg failed to even allege what reasonable accommodations she would have required to attend NMMI. "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Southeastern Comm. Coll.*, 442 U.S. at 398. Likewise, ADA regulations require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).

NMMI would have been required to substantially modify its admissions criteria and academic program for Ellenberg to be admitted to NMMI. The modifications apparently suggested by Ellenberg – namely, that NMMI ignore its fundamental and long-standing admission standards – would radically alter the core of the NMMI program. Evidence at the due process hearing demonstrated that NMMI's admissions standards are necessary to the integrity of its program. Changes to the admissions criteria would fundamentally alter the nature of NMMI's program, which under either Act is not required. *See Wong v. Regents of the Univ. of California*, 192 F.3d 807, 818 (9th Cir. 1999) (the Rehabilitation Act and the ADA do not require the institution to make fundamental or substantial modifications to its programs or standards). Thus, as is evidenced by the record below, Ellenberg failed to meet her burden to allege and show what *reasonable* accommodations would be necessary for her admission to NMMI, other than fundamentally altering the nature of its program.

D. There Are No "Compelling Reasons" Warranting This Court's Review

Ellenberg's Petition for Certiorari fails to demonstrate any "compelling reasons" for granting the Petition, as Supreme Court Rule 10 demands. Most notably, the Tenth Circuit's decision is not in conflict with another United States court of appeals' decision. The Tenth Circuit is the only court of appeals to have

ruled directly on this issue. The U.S. District Court for the District of New Jersey, the only other court to tackle this issue, like the Tenth Circuit, held that it is improper to conflate the definition of "child with a disability" under the IDEA and the definition of "handicapped" under Section 504 of the Rehabilitation Act. *See Bowers*, 563 F. Supp. 2d at 533.

Additionally, this case does not involve an "important federal question" that would warrant this Court's review. Sup. Ct. R. 10. First, this is not an issue that many courts have reviewed. As noted above, only one federal district court and one federal court of appeals have directly addressed whether a child who has an IEP is automatically considered "handicapped" under the Rehabilitation Act. Presumably, the dearth of authority on this issue is because most school-age plaintiffs who bring claims under the ADA or Rehabilitation Act present prima facie evidence of a disability or a handicap, instead of relying on their status as a child entitled to an IEP under the IDEA.

In her Petition, Ellenberg suggests that the Rehabilitation Act, the ADA and the IDEA should all be read in conjunction to justify the result she advocates. In truth, Ellenberg suggests that the IDEA should be considered alone, and the proof requirements of a claim brought under the ADA and the Rehabilitation Act should be disregarded. Ellenberg further suggests that if the Tenth Circuit's decision stands, the "process" of identifying individuals who need special education pursuant to the IDEA will simply be "for

show." Ellenberg's position fails to appreciate that the IDEA has a distinct purpose apart from the Rehabilitation Act and the ADA. *Bowers*, 563 F. Supp. 2d at 533. *See also Ellenberg*, 478 F.3d at 1275 (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) for the proposition that the IDEA is not an anti-discrimination vehicle). Suggesting the IDEA will be rendered useless if plaintiffs who assert claims under the ADA and Rehabilitation Act must actually prove a disabling condition is overly dramatic, at best. Indeed, regardless of the outcome of this case, the IDEA will continue to be in place to ensure a free and appropriate education to all children who are eligible for special education services. Likewise, the ADA and the Rehabilitation Act will continue to provide relief to real victims of disability discrimination.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: November 9, 2009

Respectfully submitted,

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